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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. MYRON WYNN, Defendant and Appellant.	D066277 (Super. Ct. No. SCD246983)

APPEAL from a judgment of the Superior Court of San Diego County, David M. Rubin, Judge. Affirmed as modified and remanded with directions.

Law Offices of Russell S. Babcock and Russell S. Babcock, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler and Julie L. Garland, Assistant Attorneys General, A. Natasha Cortina and Michael P. Pulos, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Myron Wynn of assault with a firearm (Pen. Code,[1] § 245, subd. (a)(2); counts 2 and 3), possession of a controlled substance while armed with a firearm (Health & Saf. Code, § 11370.1, subd. (a); count 4), possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a); count 5), possession of an assault weapon (§ 30605, subd. (a); count 6), and carrying a concealed weapon (§ 25400, subd. (a)(1); count 7). It found true allegations that Wynn personally used a firearm in the commission of counts 2 and 3 (§ 1192.7, subd. (c)(8)) and that he committed count 7 knowing or having reason to know the firearm was stolen. (§ 25400, subd. (c)(2).) The jury deadlocked on a robbery charge (count 1), resulting in the court declaring a mistrial and dismissing that charge. The trial court sentenced Wynn to a total prison term of four years, consisting of a two-year low term on count 2, consecutive one-year terms (one-third the midterm) each on counts 3 and 4, and concurrent two-year midterms each on counts 5, 6 and 7.

Wynn contends: (1) the trial court violated his Fourteenth Amendment rights to a fair trial and due process by denying his motion to sever counts 1, 2 and 3 (the robbery and assault charges) from counts 4 through 7 (the drug and gun possession charges); (2) Proposition 47 applies to reduce his conviction for simple possession of cocaine to a misdemeanor; and (3) his count 5 and 7 sentences for possession of a controlled substance and having a concealed firearm in a vehicle must be stayed in accordance with

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1 Statutory references are to the Penal Code unless otherwise specified.

section 654. The People concede the latter point, and we agree the judgment should be modified to stay those sentences under section 654. We otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On January 1, 2013, Edgar Sandoval, an off-duty U.S. Border Patrol agent, was in downtown San Diego with off-duty Deputy Sheriff Samuel Lizarraga and a female friend when he got into an altercation with Wynn and one or two other men on the street. Sandoval had removed his jacket, shirt and tie and was wearing a black tank top. After everyone calmed down and the altercation seemingly subsided, Wynn went to his car and retrieved a handgun from his backpack. He walked back to Sandoval and with his finger on the trigger, pressed the gun to the side of Sandoval's head and told him he was not "so bad" or "tough" now. Wynn began hitting Sandoval with the pistol and taunting him, then forced him to get on his knees. Wynn then demanded Sandoval's wallet, which contained Sandoval's federal badge and credentials. After Sandoval tossed his wallet at Wynn, Wynn told him to get on the ground and look away. A vehicle pulled up and Wynn left in it with the others.

That morning, Diego Lopez heard male voices yelling outside his mother's apartment from the third or fourth floor window, looked out the window and saw two men arguing with and pushing two other men.[2] The men stopped pushing and appeared to hug each other, then two of the men left, leaving the others standing in the street. One of the remaining men was wearing a black tank top. A few minutes later, Lopez saw the

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2 Lopez was not located by the prosecutor until the middle of trial.

same two men that had left return. One of the men was pointing a black handgun to the head of the man wearing the tank top, who dropped to his knees and put his hands behind his head. The other man being threatened with the gun was prone on the ground. Lopez called 911. He watched as the gunman and his accomplice punched both men in the face a couple of times. The gunman and his accomplice then left.

A few weeks later, Border Patrol agents received an anonymous tip about Wynn being in possession of Border Patrol credentials. On March 19, 2013, agents went to Wynn's house to speak with him. Wynn let them in and in response to their questions, pointed to Sandoval's badge and credentials in plain view on his kitchen counter. Wynn claimed to have found them in the street following the fight and was going to mail them back. He told the agents he remembered seeing a gun during the fight, but did not know who had it.

Wynn gave agents consent to search his house and cars on the premises. In Wynn's car, agents found a small baggie containing .58 grams of cocaine in the driver's side panel compartment. In another car that Wynn used but belonged to his young daughter's mother, agents found a loaded handgun in a backpack and a loaded Uzi in the trunk. Agents later obtained a search warrant for Wynn's phone and found photographs of Sandoval's credentials, Wynn's handgun, and Wynn's hand. A watch in one of the pictures showed the date to be January 31.

Wynn was arrested and interviewed by police. He initially denied having a gun or the gun's presence at the fight, but eventually admitted he had a handgun that he retrieved

from his backpack and used during the altercation. He told police he got the gun from a friend of a friend. The gun was actually stolen.

At trial, Wynn testified in his defense that Sandoval began the altercation, and then followed Wynn to his vehicle, where Wynn had gone to get his phone charger. According to Wynn, Sandoval rushed at him, so he grabbed his handgun out of his backpack and told Sandoval to back up. Wynn testified that Sandoval asked him if he was a law enforcement officer, then said he was a "fed" and threw his wallet at him. Wynn denied ordering Sandoval down on the ground; he testified that when he saw the badge, he "freaked out" and left in his vehicle. Wynn stated he kept a handgun in his backpack for his protection. He denied knowing it was stolen. Wynn explained he initially denied having a gun in his interview with detectives because he was "scared and freaked out just from the whole situation" but eventually realized he had to tell the truth.

DISCUSSION

I. *Motion to Sever Charges*

A. *Background*

Before trial, Wynn moved to sever the trial of counts 4 through 7 (the drug and gun possession charges arising from the search that occurred in March 2013) from counts 1 through 3 (the robbery and assault charges arising from events occurring in January 2013) on grounds they were not of the same class nor connected in their commission. In part, Wynn's counsel argued that Wynn's active use of a firearm was unrelated and not connected to his passive possession of a weapon three months later, even though the same weapon was referred to in count 7. Counsel argued that because counts 4 through 7

relied on the testimony of law enforcement officers who conducted the search of Wynn's vehicles, and the other counts relied on lay witnesses who were intoxicated on the night in question, there was a significant risk that introducing the evidence of counts 4 through 7 would prejudice the jury against Wynn in a trial on the other counts.

The trial court denied the motion. It ruled the charges were not wholly unrelated because the jury had to hear evidence of counts 1 through 3 before getting to the evidence relating to the law enforcement searches leading to counts 4 through 7; the crimes were roughly of the same class in that they involved possession of guns; and one of the guns was used in the count 1 through 3 offenses. The court found no combination of a weak and strong case and given the nature of the crimes of counts 1, 2 and 3, ruled there was no prejudice by including evidence of counts 4 through 7 in the same trial.

B. *Legal Principles*

"Section 954 provides that '[a]n accusatory pleading may charge two or more different offenses connected together in their commission . . . or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated.' Even where the statutory requirements for joinder are satisfied, however, 'a trial court has discretion to order that properly joined charges be tried separately.' " (*People v. Scott* (2015) 61 Cal.4th 363, 395.)

" 'The law favors the joinder of counts because such a course of action promotes efficiency.' " (*People v. Scott, supra*, 61 Cal.4th at p. 395; *People v. Trujeque* (2015) 61 Cal.4th 227, 259.) " 'A unitary trial requires a single courtroom, judge, and court

attach[és]. Only one group of jurors need serve, and the expenditure of time for jury voir dire and trial is greatly reduced over that required were the cases separately tried. In addition, the public is served by the reduced delay on disposition of criminal charges both in trial and through the appellate process.' " (*People v. Soper* (2009) 45 Cal.4th 759, 772.) "For these and related reasons, consolidation or joinder of charged offenses 'is the course of action preferred by the law.' " (*Ibid*.)

Nevertheless, " '[r]efusal to sever may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; [or] (3) a "weak" case has been joined with a "strong" case, or with another "weak" case, so that the "spillover" effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges . . . .' " (*People v. Scott*, *supra*, 61 Cal.4th at p. 396.) "If the evidence underlying the joined charges would have been cross-admissible at hypothetical separate trials, 'that factor alone is normally sufficient to dispel any suggestion of prejudice and to justify a trial court's refusal to sever properly joined charges.' " (*People v. Merriman* (2014) 60 Cal.4th 1, 38.)

"In determining whether denial of the severance motion was an abuse of discretion, we examine the record before the trial court at the time of its ruling." (*People v. Scott*, *supra*, 61 Cal.4th at p. 396.) To establish an abuse of discretion in this context, Wynn "must make a clear showing of prejudice . . . ." (*Ibid*.)

C. *Analysis*

We first decide whether the statutory requirements for joinder are met, and then assess whether the trial court properly determined that joinder would not prejudice Wynn. (*People v. Scott, supra,* 61 Cal.4th at p. 395; *People v. Lucky* (1988) 45 Cal.3d 259, 276-277.)

Wynn contends the robbery and assault charges on the one hand—relating to the New Years Eve altercation—and the drug and gun possession charges on the other—which arose three months later after law enforcement searched his vehicles—do not involve different offenses that were connected in their commission or that grew out of the same transaction. He further argues the two sets of offenses do not share a common element of substantial importance, maintaining there was no evidence at the time of the severance motion that the gun he used during the altercation was the same handgun found in his vehicle three months later.

The contentions are unavailing. Offenses are considered connected together in their commission if they are " 'linked by a " 'common element of substantial importance . . . .' " ' " (*People v. Scott, supra,* 61 Cal.4th at p. 395.) The offenses need not relate to the same transaction and they may be committed at different times and places. (See *People v. Mendoza* (2000) 24 Cal.4th 130, 160; *People v. Lucky, supra,* 45 Cal.3d at p. 276.) Here, the common element is the handgun later found in Wynn's possession that was used in the charged robbery and assault. Though Wynn argues on appeal that at the time of his motion hearing there was no evidence the same handgun was involved in those offenses, in his severance motion, Wynn specifically argued to the

contrary: that "the mere presence of the Sig Sauer handgun during both offenses (counts 1, 2, 3 and 7) does not constitute a common element of substantial importance." He did not contend that the record before the trial court lacked evidence that the handguns were the same, but instead emphasized the passive nature of the possession offense involving the same gun, claiming "the Sig Sauer was merely present in a backpack inside a BMW parked at the premises." Indeed, as the People point out, both counsel represented to the trial court that it was the same gun. Wynn argued, relying on *People v. Pike* (1962) 58 Cal.2d 70 and *People v. Renier* (1957) 148 Cal.App.2d 516, 520, that if a weapon is used in one offense and it is merely present and not used in the second offense, it was not enough to rise to the level of a substantially important common element. Thus, to the extent Wynn now asserts there was no evidence before the trial court that the weapon used in counts 1 through 3 was the same as that underlying count 7, he has forfeited that specific contention by failing to raise it below. (*People v. Smith* (2001) 24 Cal.4th 849, 852 [only claims properly raised and preserved by the parties in the trial court are reviewable on appeal].)

We conclude the threshold for joinder was met. (*Walker v. Superior Court* (1974) 37 Cal.App.3d 938, 942 ["joinder is generally proper where a specific weapon is common to more than one crime"].)[3] Wynn's reliance on *People v. Renier*, *supra*, 148 Cal.App.2d

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3 We observe that *Walker v. Superior Court*, *supra*, 37 Cal.App.3d 938, is distinguishable on its facts because there was no indication the same weapon was used in a robbery charge and later possession charge. There, the defendant was charged with an armed robbery involving three men carrying pistols and one rifle, and approximately three months later, he was arrested for possession of a concealable firearm found in his

516 does not change our conclusion. *Renier* involved the offenses of armed robbery and driving a vehicle of another without permission, charged in two separate informations. (*Id*. at p. 517.) The appellate court held that consolidation of the two informations for trial was error; that the offenses did not arise out of the same transaction, and the fact that a gun used in a robbery was also found in the stolen vehicle did not constitute a common element of sufficient substantial importance in both offenses, because there was "no evidence that any gun was used" in connection with the charge of unlawfully driving a vehicle. (*Id.* at pp. 519-520.) Under those circumstances, the court held consolidation was error, but that the error did not justify reversal because the evidence was so overwhelming that the consolidation did not result in substantial prejudice to the defendant. (*Id*. at p. 520.) Here, Wynn's very possession of the same handgun, even several weeks later, tends to prove his earlier use during the robbery/assault, and corroborates the eyewitnesses who testified that Wynn returned to the scene with a handgun and pointed it at Sandoval.[4] Under these circumstances, joinder was proper.

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home. (*Id.* at pp. 940-941.) The trial court denied the defendant's motion to sever the two counts. (*Id.* at p. 940.) Noting there was no indication that the weapon found was the same one used in the robbery, the Court of Appeal held that the trial court had abused its discretion in refusing to sever the charges: "[W]here two dissimilar offenses occur a significant period of time apart, are connected only by an otherwise unidentified weapon, and proof of one charge involves potentially prejudicial and otherwise inadmissible evidence on the second charge, the refusal to grant a motion to sever the charges is an abuse of discretion." (*Id.* at p. 943.)

[4] " '[T]he issue of cross-admissibility "is not cross-admissibility of the charged offenses but rather the admissibility of relevant evidence" that tends to prove a disputed fact. [Citations.]' [Citation.] Thus, . . . ' "complete (or so-called two-way) cross-admissibility is not required. In other words, it may be sufficient, for example, if

(Accord, *People v. Pike, supra,* 58 Cal.2d at p. 84 ["Where an accusatory pleading charges separate offenses each involving the use of the same gun in their commission, the joinder has been held to be proper under section 954"].)

We turn to the question of prejudice. Though Wynn would disagree with our conclusion above concerning cross-admissibility, he must demonstrate more than just the absence of cross-admissibility of the evidence to establish prejudice. (See *People v. Soper, supra,* 45 Cal.4th at pp. 774-775 [absence of cross-admissibility would not itself establish prejudice or an abuse of discretion in declining to sever charges].) In our view, he cannot make the heightened showing of prejudice. (*Id.* at p. 774.) Here, the evidence related to one set of charges was not more likely to inflame the jury than the evidence related to the other set of charges. In particular, Lizarraga, an off duty sheriff's deputy, testified at the preliminary hearing that although he had consumed three mixed alcoholic drinks that night, he was "very coherent" at the time of the incident. His eyewitness testimony, which included his observation that Wynn pointed the gun at Sandoval and demanded his wallet, supported the robbery and assault charges. We view the evidence supporting Wynn's guilt of each set of charges to be of comparable strength. "In any event, as between any two [sets of] charges, it always is possible to point to individual aspects of one case and argue that one is stronger than the other. A mere imbalance in the evidence, however, will not indicate a risk of prejudicial 'spillover effect,' militating against the benefits of joinder and warranting severance of properly joined charges.

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evidence underlying charge 'B' is admissible in the trial of charge 'A'—even though evidence underlying charge 'A' may not be similarly admissible in the trial of charge 'B.' " ' " (*People v. Capistrano* (2014) 59 Cal.4th 830, 848-849.)

[Citation.] Furthermore, the benefits of joinder are not outweighed—and severance is not required—merely because properly joined charges might make it more difficult for a defendant to avoid conviction compared with his or her chances were the charges to be separately tried." (*People v. Soper, supra,* 45 Cal.4th at p. 781.) The joinder of the two sets of charges did not convert the matter into a capital case; additionally, none of the charges carried the death penalty. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1244.) This factor cannot support a claim of prejudice. Accordingly, we conclude Wynn has not established the trial court's decision to deny his severance motion " ' " ' " 'falls outside the bounds of reason.' " ' " ' " (*Soper,* at p. 774.) He has not met his burden to make a *clear* showing of prejudice that would compel reversal. (*Ibid*.)

Nor can we conclude the trial court's denial of severance resulted in actual unfairness so great that it denied Wynn due process or deprived him of his right to a fair trial. (*People v. Soper*, *supra*, 45 Cal.4th at p. 783; *People v. Cook* (2006) 39 Cal.4th 566, 583.) Wynn argues that the fact the jury deliberated for two days and eventually hung on the robbery offense demonstrates more than a reasonable probability that if he had received a separate trial on the assault offenses, he would have received a better result. We cannot agree. With regard to the drug and assault weapon possession of counts 5 and 6, "the consolidated offenses were factually separable. Thus, there was a minimal risk of confusing the jury or of having the jury consider the commission of one of the joined crimes as evidence of defendant's commission of another of the joined crimes." (*People v. Mendoza*, *supra*, 24 Cal.4th at p. 163; *Soper,* at p. 784.) Wynn does not argue that the prosecution suggested that evidence from one incident could be used to

prove or strengthen the other incident. Indeed, the fact the jury could not reach agreement on the count 1 robbery charge is an indication that it *did not* use the evidence of counts 4 through 7 as an indication of Wynn's guilt on those matters. No gross unfairness resulted from joinder to deprive Wynn of a fair trial or due process of law.

II. *Proposition 47*

The trial court sentenced Wynn in June 2014. In November 2014, the voters approved Proposition 47, the Safe Neighborhoods and Schools Act, which added Penal Code section 1170.18. Effective November 5, 2014, Proposition 47 requires a misdemeanor sentence instead of a felony sentence for specified drug possession offenses. In count 5, Wynn was convicted of simple possession of cocaine under Health and Safety Code section 11350, subdivision (a). Health and Safety Code section 11350, as amended by Proposition 47, mandates that punishment for that crime shall not be more than one year in county jail. (Health & Saf. Code, § 11350, subd. (a).)

Asserting that his judgment is not yet final for purposes of applying Proposition 47, Wynn contends that under *People v. Estrada* (1965) 63 Cal.2d 740, the statute operates retroactively to permit the court to impose the lighter punishment on all defendants whose judgments are not yet final. He maintains his count 5 conviction must be reduced to a misdemeanor or else his conviction violates his right to equal protection under the Fourteenth Amendment. Wynn asks this court to either reduce his sentence or remand to the trial court for resentencing.

Section 1170.18 provides in part: "(a) A person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty

of a misdemeanor under [Proposition 47] had [it] been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing . . . ."[5]

Giving these words their ordinary and usual meaning (see *People v. Park* (2013) 56 Cal.4th 782, 796), any defendant who is serving a sentence for a Proposition 47 qualifying offense when that initiative became effective may petition for a recall of sentence so as to request resentencing. The act unambiguously states the manner in which any adjustment in such a defendant's sentence is to be accomplished. Accordingly, there is no issue presented as to retroactivity. Because Wynn is "[a] person currently serving a sentence for a conviction . . . of a felony or felonies who would have been guilty of a misdemeanor under the act" (§ 1170.18, subd. (a)), he benefits from Proposition 47 because he is permitted to exercise the statutory remedy of petitioning for recall of sentence in the trial court. (*People v. Noyan* (2014) 232 Cal.App.4th 657, 672; see *People v. DeHoyos* (June 30, 2015, D065961) ___ Cal.App.4th ___ [2015 WL 3978685].)

However, a trial court does not have jurisdiction over a cause during the pendency of appeal as to anything that may affect the judgment. (*People v. Flores* (2003) 30 Cal.4th 1059, 1064; *In re Osslo* (1958) 51 Cal.2d 371, 379-380.) Thus, a petition for

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5 Section 1170.18 continues in part: "(b) Upon receiving a petition under subdivision (a), the court shall determine whether the petitioner satisfies the criteria in subdivision (a). If the petitioner satisfies the criteria in subdivision (a), the petitioner's felony sentence shall be recalled and the petitioner resentenced to a misdemeanor . . . , unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety."

recall of sentence under Proposition 47 must be filed once the judgment is final and jurisdiction of the case has been returned to the trial court. In sum, Wynn is limited to the statutory remedy of petitioning the trial court for recall of sentence when his judgment is final.

III. *Stay of Count 5 and 7 Sentences under Section 654*

Wynn contends the trial court erred by failing to stay under section 654[6] his sentences on the count 5 conviction for possessing a controlled substance and count 7 conviction for carrying a concealed weapon in a vehicle. He maintains those offenses are based on the same individual acts underlying the count 4 offense of possessing cocaine while armed. The People concede the issue, pointing out that the acts of counts 5 and 7—possessing cocaine as well as a loaded handgun on March 19, 2013—are the same acts charged in count 4. We agree the trial court should have stayed the sentences on counts 5 and 7 under section 654.

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6 Section 654, subdivision (a) provides in part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

DISPOSITION

The judgment is modified to stay under Penal Code section 654 Wynn's count 5 and 7 sentences for possession of a controlled substance and having a concealed firearm in a vehicle. As so modified the judgment is affirmed. The superior court is directed to amend the abstract of judgment to reflect this modification and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

O'ROURKE, J.

WE CONCUR:

McINTYRE, Acting P. J.

AARON, J.